Supreme Court, U.S.
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No. 85-2050

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

JOHNSON & JOHNSON PRODUCTS, INC.,
Petitioner,

VS.

LYNETTE WEST,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

BRIEF FOR RESPONDENT IN OPPOSITION

ROBERT P. FISHER
FISHER LAW OFFICES
2425 Porter Street, Suite 5
Soquel, California 95073
Telephone: (408) 462-1055
Counsel for Respondent
Lynette West

Of Counsel:

THOMAS C. GLASPY
GLASPY & GLASPY
150 Almaden Boulevard, Suite 700
San Jose, California 95113
Telephone: (408) 279-8844

BOWNE OF SAN FRANCISCO INC. • 190 NINTH ST. • S.F. CA 94103 • (415) 864-2300

QUESTIONS PRESENTED

Was the imposition of punitive damages against Petitioner, the manufacturer of a vaginal product (o.b. tampons), proper where the evidence at trial established that:

(1) Petitioner knew that its product was being associated with the incurrence of vaginal infections;

(2) Petitioner consciously disregarded this knowledge and marketed its product without adequately testing it; and,

(3) as a result of Petitioner's aforementioned conduct, Respondent suffered a life-threatening and near fatal vaginal infection, toxic shock syndrome?

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BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion and order of the trial court (the Superior Court of the State of California, County of Santa Clara) disposing of the post-trial motions of the Petitioner, herein, is reproduced at page A-139 of the Appendix to the Petition. The opinion of the Court of Appeal of the State of California, Sixth Appellate District (the "Court of Appeal"), is reported at 174 Cal.App.3d 831, 220 Cal.Rptr. 437 and is reproduced at page A-4 of the Appendix to the Petition. The order of the California Court of Appeal denying Petitioner's request for rehearing appears at page A-3 of the Appendix to the Petition. The order of the Supreme Court of the State of California summarily denying review of the opinion of the Court of Appeal is reproduced at page A-1 of the Appendix to the Petition.

JURISDICTION

As set forth in the Argument below, this Court does not have jurisdiction to review the judgment under 28 U.S.C. § 1257(3) because Petitioner failed to adequately frame and raise the federal question in the state court proceedings.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the United States Constitution, Amendment XIV, and of California's Civil Code § 3294 (Supp. 1986) are set forth in the Petition at page 2.

STATEMENT OF THE CASE

In 1974, Johnson & Johnson Products, Inc. (hereinafter referred to as "Petitioner"), began importing, marketing and selling o.b. tampons in the United States. By 1977, Petitioner was manufacturing o.b. tampons in the United States (A-21).[1]

Prior to marketing o.b. tampons, Petitioner conducted several tests to explore and define the bacteriology of a woman's vagina during menstruation and, furthermore, conducted some clinical testing to determine consumer satisfaction and acceptance of the product. From 1971 through 1973, Petitioner initiated studies aimed at determining the number and type of bacteria present in the vagina both before and during menstruation. Among other things, these studies disclosed to Petitioner that, with the onset of menses, pathogens (i.e., bacteria capable of producing disease) invade the vagina and proliferate, or reproduce, at a rapid rate (A-23). These studies further indicated that six percent of the women tested exhibited evidence of a known pathogen, staphylococcus aureus, during menses (A-24).

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[1] References to the Appendix to the Petition are denoted by the abbreviation, "A", followed by the page number; references to the Reporter's Transcript and the Clerk's Transcript are denoted by the abbreviations, "R.T." and "C.T.", respectively, followed by the referenced page number.

In 1975, Petitioner began testing an experimental tampon, which it dubbed the "health tampon".The express purpose of these tests was to determine whether or not Petitioner could develop a "healthy" tampon, i.e., a tampon which would reduce the proliferation of pathogens during menstruation. Petitioner's attempts in this regard were unsuccessful (A-27); therefore, Petitioner continued to market o.b. tampons and, in fact, thereafter increased production of o.b. tampons in the United States (A-21).

Although Petitioner was unable to develop a "healthy tampon," their 1975 tests did disclose relevant information to Petitioner: when an o.b. tampon is placed in the vagina, the total bacterial count of the vagina drops, thereby indicating that the tampon is absorbing bacteria; and o.b. tampons "slough" (i.e., fibers from the tampon are stripped from the tampon and deposited onto the vaginal walls thereby creating a breeding ground for infection) (A-26).

At least as early as 1975, Petitioner began receiving complaints from consumers and physicians about vaginal infections and other adverse reactions associated with the use of o.b. tampons (A-30). In fact, over the succeeding four years (1975 through 1979), Petitioner received over 150 complaints of a "more serious" nature (A-30), as well as countless other complaints with respect to the use of o.b. tampons. In addition, some of Petitioner's early test subjects had complained about adverse reactions experienced while using Petitioner's o.b. tampons (R.T. 589). Petitioner ignored these numerous and continuing complaints; in fact, it conducted absolutely no studies to determine the reasons why its tampons were causing these vaginal infections (A-27; A-31).

In February of 1980, Respondent contracted a vaginal infection or disease known as Toxic Shock Syndrome (hereinafter referred to as "TSS") while using Petitioner's tampons (A-8; A-14).[2] TSS, like many of the other vaginal infections reported to

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[2] Although prior cases of TSS had been recorded as far back as the 1920's, the disease was not named until mid-1980, following a four-week study conducted by the Food and Drug Administration's Center for Disease Control.

Petitioner in the years preceding Respondent's illness, is an infectious process of microbial origin (R.T. 727-728).[3]

In June of 1980, after only four weeks of *unassisted* investigation, the Food and Drug Administration's Center for Disease Control associated TSS with the use of tampons and the proliferation of staphylococcus aureus (A-106–A-107).[4]

Respondent's trial experts testified that her use of o.b. tampons was the cause of her contraction of TSS in February of 1980 (A-40).

Thus, prior to the time that Petitioner's o.b. tampons caused Respondent's contraction of TSS, Petitioner *knew* that:

(1) during menstruation, the vagina is a breeding ground for pathogenic bacteria, including staphylococcus aureus;

(2) o.b. tampons absorbed these pathogens; and

(3) many test subjects, consumers and physicians were complaining about vaginal infections and other adverse reac-

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[3] In fact, on review of Petitioner's consumer complaint files, one of Respondent's trial experts, Dr. Bruce Hanna, testified that some of the consumers complained of symptomologies similar to (if not identical to) Respondent's complaints of February 1980.

[4] Petitioner argues that its conduct in marketing o.b. tampons (despite its knowledge) should be vindicated because only a retrospective study, like the one conducted by the Center for Disease Control, could have indentified the association between TSS and tampon use. In "support" of this proposition, Petitioner cites the testimony of Respondent's trial expert and the head of the Center for Disease Control's TSS Task Force, Dr. Bruce Dan (Petition, p. 5, Footnote 3). However, Dr. Dan merely stated that no one *"in the public health community"* knew of the association between TSS and tampons in February of 1980 (R.T. 493). It must be remembered that Dr. Dan and the Center for Disease Control did *not* have access to Petitioner's consumer complaint files in February of 1980. With such information, it is quite possible that the CDC could have drawn the connection in *less* than four weeks' time. At a minimum, the Center for Disease Control would have known prior to February 1980 that o.b. tampons were being associated with other vaginal infections.

> tions resulting from the suggested use of Petitioner's o.b. tampons.

In "reckless indifference" to the safety of Respondent and the female population, as a whole, Petitioner marketed o.b. tampons despite this knowledge. The trial court found Petitioner's conduct in this regard to be "reprehensible" (A-144; C.T. 707). As further stated by one of Respondent's trial experts:

> [Petitioner] had an "obligation to attempt to determine whether or not their tampon was causing these reactions . . . [and] my professional opinion is that they completely ignored it . . . [defendant's conduct in this regard was] conscious and . . . this was disregarding a very serious problem" (A-106).

ARGUMENT AGAINST GRANTING PETITION

I. THIS COURT DOES NOT HAVE JURISDICTION TO REVIEW THE JUDGMENT IN QUESTION

Petitioner claims that 28 U.S.C. § 1257(3) confers jurisdiction on this Court to review the subject judgment because it purportedly raises a federal issue: the alleged deprivation of Petitioner's rights under the Due Process Clause of the United States Constitution. However, this Court does not have jurisdiction because Petitioner failed to properly frame and raise the federal question in the state court proceedings. In *Amalgamated Food Employees Union v. Logan Valley Plaza,* 391 U.S. 308, at 344, 20 L.Ed. 603, 88 S.Ct. 1601 (1967), Justice Harlan indicated in a dissenting opinion that such an error bars jurisdiction:

> The rule that in cases coming from state courts, this Court may review only those issues presented to the state court is not discretionary but jurisdictional.

(See: *Cardinale v. Louisiana,* 394 U.S. 437, at 439, 22 L.Ed. 398, 89 S.Ct. 1162 (1969), where this Court listed the bases for ignoring federal constitutional issues not adequately raised in state court proceedings.)

On numerous occasions, this Court has stated that, with respect to review of a state court judgment, jurisdiction will not be conferred on this Court unless the petitioner:

> (1) raised the federal question in the state court proceedings on a timely basis; (*Godchaux Co. v. Estopinal,* 251 U.S. 179, 64 L.Ed 213, 40 S.Ct. 116 (1919); and *Beck v. Washington,* 369 U.S. 541, 8 L.Ed.2d 98, 82 S.Ct. 955 (1961); and,
>
> (2) framed the question with sufficient particularity in the state court proceedings so as to identify the particular clause of the federal constitution being invoked, and the rights being claimed thereunder. (*Herndon v. Georgia,* 295 U.S. 441, 79 L.Ed. 530, 55 S.Ct. 794 (1935); *Harding v. Illinois,* 196 U.S. 78, 49 L.Ed. 394, 25 S.Ct. 76 (1904); and, *Capital City Co. v. Ohio,* 183 U.S. 238, 46 L.Ed. 171, 22 S.Ct. 120 (1901).

In determining the proper method and timing for raising the federal question in state court proceedings, this Court has ruled that state law shall be controlling. (*Central Union Co. v. Edwardsville,* 269 U.S. 190, 70 L.Ed. 229, 46 S.Ct. 90 (1925); *Pennsylvania R. Co. v. Illinois Brick Co.,* 297 U.S. 447, 80 L.Ed. 796, 56 S.Ct. 556 (1936); *Parker v. Illinois,* 333 U.S. 571, 92 L.Ed. 886, 68 S.Ct. 708 (1955); and, *Michel v. Louisiana,* 350 U.S. 91, 100 L.Ed. 83, 76 S.Ct. 158 (1955).)

In California, litigants are required to raise all issues, federal or otherwise, in the original briefs on appeal; it is insufficient to raise a question for the first time in a petition to the intermediate appellate court for rehearing:

> The courts have on numerous occasions declared that they will not grant rehearing on points newly urged in the petition. It is the duty of counsel to see that all points are properly presented in the original briefs or argument, before submission. (*City of Saratoga v. Huff,* 24 Cal.App.3d 978, 1006, 101 Cal.Rptr. 32 (1972).)

[See also: *San Francisco v. Pacific Bank,* 89 Cal. 23; 26 P. 615 (1891), and *San Marino v. Roman Catholic Archbishop,* 180 Cal.App.2d 657; 4 Cal.Rptr. 547 (1960).]

In this matter, Petitioner failed to raise the federal question advanced herein, i.e., a violation of the United States Constitution's Due Process Clause, until it petitioned the Court of Appeal for rehearing.[5] Prior to that point in time, Petitioner did not raise any constitutional challenges.[6] The Petition for Rehearing was

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[5] In its Petition to the Court of Appeal for Rehearing, Petitioner argued for the first time:

> Both the Due Process Clause of the 14th Amendment and Section 13 of the California Constitution prohibit imposition of punishment without sufficiently articulated standards . . . (JJP's Petition to the California Court of Appeal for Rehearing, p. 9.)

In her response to Petitioner's Petition for Rehearing, respondent challenged petitioner's tardiness in raising this constitutional issue:

> . . . plaintiff requests that this Court disregard the following matters raised by defendant for the first time in its petition for rehearing . . . (3) Defendant's "constitutional challenges." Since these points were not discussed at trial, in defendant's appellate brief, or at oral argument, it is improper for defendant to raise these issues at this time. (Citations) (Plaintiff's Answer to Defendant's Petition to the Court of Appeal for Rehearing, pp. 2-3.)

[6] The opinion of the Court of Appeal outlined the arguments, issues and contentions raised by defendant on appeal:

> On appeal JJP contends:
>
> 1. That West's counsel, by means of a "semantic ploy," mischaracterized the action as a "design defect" case rather than a "failure to warn" case; and this "semantic ploy" led to the rejection of JJP's proferred instructions on "failure to warn";
>
> 2. That no substantial evidence was presented to show that a lack of adequate instructions or of a warning proximately caused West's injury;
>
> 3. That the trial court committed prejudicial error by receiving in evidence, over objection, testimony concerning consumer complaints about JJP's tampon;
>
> 4. That West's counsel engaged in prejudicial misconduct in opening statement, in examining witnesses, and in argument; and,
>
> 5. That the trial court committed prejudicial error in instructing the jury (a) on the "consumer expectation" test, rather than the "risk-benefit" test, set forth in *Barker v. Lull Engineering Co.* 20 Cal.3d 413, 435 (1978); (b) on the issue of punitive

denied without comment (A-3). Similarly, the California Supreme Court denied Petitioner's Petition without comment (A-1).

In a case such as the instant one, where (1) the Petitioner failed to raise the federal constitutional issue in the trial court, (2) the Petitioner did not raise the federal constitutional issue until its Petition for Rehearing addressed to the state's intermediate court, and (3) the state's highest court refused without opinion to hear the case, this Court has ruled that it is precluded from reviewing a petition for writ of certiorari. *Stembridge v. Georgia,* 343 U.S. 541, 96 L.Ed. 1130, 72 S.Ct. 834 (1952).

Thus, Petitioner's failure to properly frame and timely raise the federal constitutional issue in the state court proceedings precludes this Court from reviewing the state court judgment due to lack of jurisdiction.

Even if Petitioner had properly raised the federal question below, Petitioner has still failed to present this Court with any real controversy or substantial issue for review. As explained below (see: Argument, Section II), the federal question belatedly raised by Petitioner has been explicitly foreclosed by prior decisions of this Court. In accordance with this Court's prior rulings, the Petition should be denied. *Zucht v. King,* 260 U.S. 174, 67 L.Ed. 184, 43 S.Ct. 24 (1922); *Palmer Oil Corporation v. Amerada Corporation,* 343 U.S. 390, 96 L.Ed. 1022, 72 S.Ct. 842 (1952).

II. THE PETITION FAILS TO RAISE ANY NEW OR IMPORTANT FEDERAL ISSUES WHICH WOULD WARRANT REVIEW BY THIS COURT

Petitioner contends that punitive damages were "imposed for the failure to acquire knowledge . . ."; however, Petitioner has totally ignored and disregarded the evidence establishing the existence of its knowledge.

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damages; and (c) on the issue of willful suppression of evidence. (A6-A7)

As evidenced in the language, above, Petitioner failed to raise any arguments about a violation of the Due Process Clause of the United States Constitution.

Punitive damages were imposed against Petitioner because it acted in *conscious disregard* of Respondent's safety by marketing a product which it knew to be associated with various vaginal infections. Respondent contracted a vaginal infection, TSS, in February of 1980 as a result of her use of Petitioner's o.b. tampons.

The Petition actually requests this Court to set a "threshold of culpability for punitive damage liability". (Petition, p. 14.) This request ignores a very basic fact: this Court has already set such a standard!

A. The Punitive Damage Doctrine Has Already Been Accepted As "Theoretically Correct" By This Court

In the latter part of the nineteenth century, this Court repeatedly upheld the constitutionality of the punitive damage doctrine. *Day v. Woodworth,* 54 U.S. (13 How.) 363, 14 L.Ed. 181 (1852); *Philadelphia, W. & B. R. Co. v. Quigley,* 62 U.S. (21 How.) 202, 16 L.Ed. 73 (1859); *Milwaukee & St. Paul R. Co. v. Arms,* 91 U.S. 489, 23 L.Ed. 374 (1876); *Missouri Pacific R. Co. v. Humes,* 115 U.S. 512, 29 L.Ed. 463, 6 S.Ct. 110 (1885); *Barry v. Edmunds,* 116 U.S. 550, 29 L.Ed. 729, 6 S.Ct. 501 (1886); *Minneapolis & St. Louis R. Co. v. Beckwith,* 129 U.S. 26, 32 L.Ed. 585, 9 S.Ct. 207 (1889); *Scott v. Donald,* 165 U.S. 58, 41 L.Ed. 632, 17 S.Ct. 265 (1897).

In 1983, this Court expressly noted that the punitive damage doctrine has been accepted as "settled law" since the turn of the century:

> Although there was debate about the theoretical correctness of the punitive damages doctrine in the latter part of the last century, the doctrine was accepted as settled law by nearly all state and federal courts, including this Court. *Smith v. Wade,* 461 U.S. 30, 75 L.Ed. 2d 632, 103 S.Ct. 1625 (1983).

B. Punitive Damages May Be Awarded Without A Showing Of Actual Ill Will, Spite Or Intent To Injure

The precise issue which Petitioner herein advances was discussed *at length* in *Smith v. Wade, Id.* at 38-43:

> Perhaps not surprisingly, there was significant variation (both terminological and substantive) among American jurisdictions in the latter nineteenth century on the precise standard to be applied in awarding punitive damages—variation that was exacerbated by the ambiguity and slipperiness of such common terms as "malice" and "gross negligence". Most of the confusion, however, seems to have been over the degree of negligence, recklessness, carelessness, or culpable indifference that should be required—not over whether actual intent was essential. On the contrary, the rule in a large majority of jurisdictions was that punitive damages (also called exemplary damages, vindictive damages, or smart money) could be awarded without a showing of actual ill will, spite, or intent to injure.
>
> This Court so stated on several occasions, before and shortly after 1871. . . .
>
> The Court further explained the standard for punitive damages in *Milwaukee and St. Paul R. Co. v. Arms,* 91 U.S. 489, 23 L.Ed. 374 (1876), a diversity railroad collision case:
>
> . . . To [assess punitive damges], there must have been some wilful misconduct, or that entire want of care which would raise the presumption of a *conscious indifference* to consequences. *Id.*, at 495, 23 L.Ed. 374. (emphasis added)

Even in those instances where the Court has afforded its greatest protection, First Amendment rights, the imposition of punitive damages has been upheld where the defendant's conduct has been shown to be in "reckless disregard". *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 41 L.Ed.2d 789, 94 S.Ct. 2997 (1974). Petitioner certainly has not established that the instant facts present a case demanding higher protection than that afforded under the First Amendment.

C. California's Punitive Damage Statute Is Consistent With This Court's Constitutionally-Prescribed Standards

California's punitive damage statute, California Civil Code § 3294, permits the imposition of punitive damages " . . . where the defendant has been guilty of oppression, fraud, or malice . . .". "Malice" is defined as:

> . . . Conduct which is intended by the defendant to cause injury to the plaintiff or *conduct which is carried on by the defendant with a conscious disregard of the rights or safety of others.* California Civil Code § 3294(c)(1) (Supp. 1986) (emphasis added).

California's standard of "conscious disregard" is consistent with and synonymous with the language initially approved by this Court in *Milwaukee and St. Paul R. Co. v. Arms*, 91 U.S. 489, 23 L.Ed. 374 (1876) and recently cited with approval in *Smith v. Wade, supra,* at 483, 75 L.Ed.2d 632, 103 S.Ct. 1625:

> . . . To [assess punitive damages], there must have been some willful misconduct, or that entire want of care which would raise the presumption of a *conscious indifference* to consequences. (Emphasis added.)

The Restatement (Second) of Torts (1979), section 908(2) also states a rule quite similar to California's Civil Code section 3294:

> Punitive damages may be awarded for conduct that is outrageous because of defendant's evil motive or his *reckless indifference to the rights of others.* (Emphasis added.)

These variances in terminology (between California's "conscious disregard of the rights or safety of others", and this Court's "conscious indifference to consequences", on the one hand, or the Restatement's "reckless indifference to the rights of others", on the other hand) do not justify a review of this case by this Court.[7]

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[7] In fact, in its initial appellate brief, Petitioner conceded that California's punitive damage statute, Civil Code § 3294, has a more demanding standard ("conscious disregard") than that required by this Court ("reckless indifference"). In discussing the opinion of the 8th Circuit in

In fact, in dicta in *Smith v. Wade*, this Court recognized that such variances are not substantial:

> Most cases under state common law, although varying in their precise terminology, have adopted more or less the same rule, recognizing that punitive damages in tort cases may be awarded not only for actual intent to injure or evil motive, but also for recklessness, serious indifference to or disregard for the rights of others, or even gross negligence. 461 U.S. at 47, 75 L.Ed.2d 632, 103 S.Ct. 1625.

Thus, there is no real controversy over the proper standard for the imposition of punitive damages as this federal question has been explicitly foreclosed by this Court's prior decisions. Therefore, the issue raised by Petitioner is insubstantial and does not merit review. *Equitable Life Assurance Society v. Brown*, 187 U.S. 308, 47 L.Ed. 190, 23 S.Ct. 123 (1902).

III. THE PETITION RAISES A FACTUAL QUESTION WHICH IS UNIQUELY NARROW AND APPLIES ONLY TO THE INSTANT CASE

The only issue actually raised by the Petition relates to the peculiar facts of this case:

> Did Petitioner act in conscious disregard of Respondent's safety by marketing o.b. tampons despite knowledge (derived from consumers, physicians and test subjects) that its tampons were associated with and linked to various vaginal infections?

A jury found Petitioner's conduct to be of such an eggregious nature that it awarded punitive damages of ten million dollars.

Kehm v. Proctor & Gamble Manufacturing Co., 724 F.2d 613 (8th Cir. 1983), *Aff'g* 580 F. Supp. 890 (N.D. Iowa 1982), Petitioner admitted:

> Nonetheless, the Eighth Circuit ruled plaintiff had failed to make out a prima facie case for punitive damages under Iowa law which required only a showing that "defendant's product was wanton or reckless, exhibiting complete disregard for the plaintiff's rights."
>
> By contrast, under California law, mere recklessness is an insufficient basis for an award of punitive damages. *G.D. Searle & Co., supra*, 49 Cal.App.3d at 32.

The trial court similarly found defendant's conduct "reprehensible" (A-144; C.T. 707).

In contending that its conduct was, at most, negligent, Petitioner has failed to accurately focus on the facts of this case. It must be emphasized that punitive damages were *not* imposed for Petitioner's "failure to predict adverse experiences" (as suggested in the Petition at p. 19); rather, punitive damages were imposed because Petitioner decided to market o.b. tampons, without adequate testing, even though it *knew* of serious problems relating to the use of its product. Petitioner's conduct demonstrated such a want of care that it raised a presumption of indifference to the consequences. As a result of Petitioner's conduct, Respondent suffered TSS in February of 1980.

As concluded by the Court of Appeal, this conduct justified the imposition of punitive damages:

> All of the foregoing was substantial, competent and relevant evidence. From such evidence the jury could reasonably have concluded (1) that adequate testing would have revealed an association between tampon use and vaginal infection, and ultimately between such use and menstrually-related TSS; (2) that JJP's testing was inadequate; (3) that *JJP's decision not to do any further testing, even when faced with continuing consumer complaints, was a conscious one; and* (4) therefore, *JJP acted in conscious disregard of the safety of others.* A-107 (emphasis added).

In concluding, Petitioner asked this Court:

> "What would the California Court have had JJP do to avoid punitive liability?" (Petition, p. 24.)

One need only look to two passages in the testimony of Respondent's trial experts, Dr. Bruce Hanna and Dr. Philip Tierno, for the answers. Dr. Hanna stated that, at least as early as 1977, Petitioner had enough information as a result of consumer complaints to inquire into the relationship between o.b. tampons and vaginal infections. In response to the question, "Do you think that a reasonably prudent average microbiologist should have

asked the question, 'Are tampons causing infections of some kind?' ", Dr. Hanna responded:

> Well, in my opinion, that question should have been asked before the tampons were sent out to these ladies. I think that's—at this point [1977], I don't see any reason why that question should not have been asked. They should have been right on top of it. [(R.T. 728) (emphasis added).]

In response to the question, "What ought to be done with tampons?", Dr. Tierno similarly stated:

> I think they should be adequately tested prior to putting them on the market . . .
>
> . . . and they should be properly made, with natural materials such as cotton . . .
>
> . . . and not super absorbants. (R.T. 679)

Petitioner was clearly aware of the health problems associated with the use of its tampons and could have avoided exposing Respondent and others to injury. Instead, Petitioner consciously disregarded Respondent's safety and continued to market its unsafe product. As a result, Respondent suffered severe injuries in February of 1980.

CONCLUSION

For the reasons stated above, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

ROBERT P. FISHER
FISHER LAW OFFICES
2425 Porter Street, Suite 5
Soquel, California 95073
Telephone: (408) 462-1055
Counsel for Respondent
Lynette West

Of Counsel:

THOMAS C. GLASPY
GLASPY & GLASPY
150 Almaden Boulevard, Suite 700
San Jose, California 95113
Telephone: (408) 279-8844